PERSONAL PROPERTY—UNPATENTED INVENTIONS.—The determination of what is personal property and what is not is in its metaphysical and legal aspect a problem not free from considerable difficulty. If the law were an immutable body of maxims and definitions it would be a comparatively easy matter to ascertain whether certain things alleged to be property fall within the definitions. However, due to the great increase in commerce during the past few centuries and the increasingly complex interrelationships between the different members of organized society resulting therefrom, the courts are constantly confronted with new situations and problems. Thus in the earnest efforts of the Judiciary to grant new remedies under old forms, the classic definitions strained to cover one case, enlarged to cover another, become unlike their former selves and fail to cover problems with their former exactitude and nicety, with the result that Coke, Littleton and other authorities of former days would scarce recognize their modern meanings.

This is especially well illustrated by the courts of equity which in their efforts to mete out justice have still confined their jurisdiction to cases affecting property rights, but have extended the definitions to cover cases never contemplated in the early history of the courts. So it has been held that secret processes discovered by an employee of a firm in pursuance of an employment for that purpose become the property of the firm without an express assignment,[1] and that an employee is bound to disclose a secret process discovered by him in the course of his employment.[2] Since these and similar cases have been decided on the theory that equity would assist the employer on the ground that his property rights were being infringed, the conclusion would seem to follow that the courts recognize property rights in these unpatented inventions and that therefore the inventions or discoveries are in themselves property, for it is fundamental that property rights are inherent only in that which is itself property. The fallacy of this reasoning is readily apparent when it is remembered that the courts of equity do not interfere to protect property rights in the unpatented invention, but only to prevent the employee from making use of the discovery so as to decrease the pecuniary return that might result therefrom to the employer, and affect his property rights in this manner.

The question as to whether an invention, before application has been made for a patent, is property so as to constitute an asset in bankruptcy[3] was brought up squarely for the first time in

[1] Baldwin v. Von Micheroux, 5 Misc. 386; 25 N. Y. S. 857 (1893).

[2] Silver Spring B. & D. Co. v. Woolworth, 16 R. I. 729; 19 Atl. 528 (1890). Dempsey v. J. & J. Dobson, 174 Pa. 122; 34 Atl. 528 (1896).

[3] The following rights were held to be assets in bankruptcy proceedings: A license to sell liquor. *Re* Becker, 98 Fed. 407 (1900). A license to use a market stall. *Re* Emrich, 101 Fed. 231 (1900). A seat on a stock exchange. *In re* Page 102 Fed. 746 (1900) affirmed in 187 U. S. 596 (1902). A wife's right to elect to take against her husband's will. Tenbrook v. Jessup, 60 N. J. E. 235; 46 Atl. 516 (1900). But see Fleming's Estate, 217 Pa. 610; 66 Atl. 874 (1907) and Pike County v. Sowards, 147 Ky. 37; 143 S. W. 745 (1912), wherein it was held the right of a husband to elect to take against his wife's will was a "personal privilege" and was therefore not an asset in bankruptcy.

a recent New York case[4] and was answered in the negative. The court proceeded on the theory that an invention, before application has been made for a patent lacks "the primary and essential characteristic of property, viz., the capability of being exclusively possessed, owned and used." But it is submitted, however, that a patent once granted, which is universally held to be "property,"[5] fails to answer the broad definition advanced by the court, inasmuch as a patent is a peculiar species of property unknown to the common-law and unlike other property the right to its exclusive possession and use is limited to that period of time prescribed by the patent laws of the sovereign power granting the patent.

Not a little of the confusion as to the exact nature of an unpatented invention is due to the loose use of the word "property" by the courts, and the lay conception that any original idea capable of being communicated and often-times, as in the case of unpatented inventions, a thing of more or less value, is "property." Something akin to this idea is often found in the decisions. Thus it has been held that an invention even before a patent has been applied for is the subject of sale[6] and indeed there is a dictum in one case to the effect that an unpatented invention is "property."[7] The error arises from the confusion of that which has "existence" with the term "property" which has a technical legal meaning.

It is only upon the application for a patent that an invention can be properly called "property"[8] for until the application has been made the inventor has merely a common-law right to enjoy the fruits of his invention so long as he can guard it; for upon discovery the secret inures to the benefit of the public.[9] Thus it is quite evident that it is impossible to give any categorical definition of the term "property,"[10] and that the solution of modern problems is not to be found in the old classical definitions but only in the light of the modifications placed upon them by the latest decisions.

J. S.

INTERPRETATION OF THE COMMODITIES CLAUSE OF THE ACT OF CONGRESS REGULATING RAILROADS.—The Act of Congress, passed June 29, 1906,[1] popularly called the "Hepburn Act," contains a clause usually referred to as the "Commodities Clause."

[4] Rosenthal v. Goldstein, 183 N. Y. S. 582 (1920).
[5] Wilson v. Rousseau, 45 U. S. (4 How.) 646 (1846); 20 R. C. L. 1178.
[6] Ullman v. Thompson, 57 Ind. App. 126; 106 N. E. 611 (1914).
[7] Fisher v. Cushman, 103 Fed. 860 (1900).
[8] *In re* Cantelo Mfg. Co., 185 Fed. 276 (1911). *In re* Myers-Wolf Mfg. Co., 205 Fed. 289 (1913). See *contra* the earlier cases of *In re* McDonell, 101 Fed. 239 (1900). *In re* Dann, 129 Fed. 495 (1904).
[9] Marsh v. Nichols, Shepard & Co., 128 U. S. 605 (1888).
[10] Fisher v. Cushman, *supra.*
[1] 34 Stat., L. 585, as amended by 36 Stat., L. 547.